

# ***Californians for Renewable Energy, Inc.(CARE)***

821 Lakeknoll Dr.  
Sunnyvale, CA 94089  
(408) 325-4690

## **STATE OF CALIFORNIA**

Energy Resources Conservation  
and Development Commission

In the Matter of:

Application for Certification for the  
Metcalf Energy Center [Calpine  
Corporation and Bechtel Enterprises, Inc.]

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) Docket No. 99-AFC-3  
)  
) **City of San Jose is "lead-agency"**  
) **in the MEC general plan amendment**  
) **process pursuant to CEQA**  
)

*Intervenor CARE requests that to the extent the comments and requests in the following letter to the City of San Jose apply to the CEC, in addition to being acted on by the CEC, that the letter be added to the Metcalf Energy Center (MEC) project's administrative record.*

*Michael E. Boyd*

Michael E. Boyd President, CARE 9-1-00

**City Council of San Jose**  
**C/o Mayor Ron Gonzales**  
Mayor's Office, City Hall  
801 North First St. Suite 600  
San Jose, CA 95110

Dear Mayor Gonzales,

In regard to the status conference hearing held before the California Energy Commission (CEC) "hearing officer" Valkosky on 08/16/00 (please note that the whole idea of status hearings before hearing officers while project applicants are allowed to delay submitting vital information such as data regarding impacts on biological resources that include listed species--e.g. bay checker-spotted butterfly and red the legged frog--is completely foreign to and can hardly be deemed "equivalent" to CEQA procedures), CARE strongly objects to statements regarding CEQA procedures made by Laura Prevetti on behalf of the City of San Jose (the city), and CARE hereby demands that the matters addressed by Ms. Prevetti, as further discussed below, be clarified and rectified so as to fully comply with CEQA. In addition, as also further stated below, CARE is requesting that the city as well as the CEC make records available for inspection and copying in accordance with the California Public Records Act.

At the 08/16/00 status hearing, Ms. Prevetti was directly asked to explain the CEQA process the city is following or intends to follow regarding the application for a general plan amendment, rezoning and annexation submitted by the Calpine/Bechtel partnership in regard to the Metcalf Energy Center project.

Ms. Private's response included the statements that the city is "looking for the FSA as our CEQA equivalent document," and that the city is not doing its own CEQA review and "is relying entirely on the CEC proceedings." Ms. Prevetti herself expressed some doubt about the validity of this process by stating: "I can't speak for our attorneys, but I assume that that might call into question whether or not the FSA could, in fact, act as a CEQA equivalent final EIR."

Unlike her statements about using the FSA as the exclusive environmental documentation, Ms. Private's assumption about the suggested process being called into question is right on point.

First of all, kindly consider that the city is not merely a CEQA "responsible agency" in regard to the project stemming from the Calpine/Bechtel application. In regard to that particular project/overall activity, which requires the city to take quasi-legislative action such as adopting a general plan amendment, the city is clearly the CEQA "lead agency." As such, the city cannot avoid doing its own CEQA review, and the city cannot rely entirely on environmental documentation created by another agency--whether or not the other agency certifies, blesses, smiles upon, kisses or otherwise approves its own so called CEQA equivalent review.

Secondly, unlike the CEC, the city does not have a partial exemption from CEQA as the result of the adoption of a certified regulatory program. Therefore, the city, in discharging its function as a CEQA lead agency, is not authorized to use an FSA or any other purported CEQA-equivalent documentation. The city must prepare its own environmental documentation--in this case obviously an EIR--and city decision makers must exercise their own discretion and judgment in reviewing and approving the MEC project as presented to the city.

Nowhere is this more evident than in regard to the making of a "statement of overriding considerations" (SOC). As will be made clear as soon as Calpine/Bechtel are finally required to submit vital information about impacts on biological resources--and as already made perfectly clear by CARE's expert, Dr. Smallwood, an SOC will be required in this case because, inter alia, there are unmitigable, potentially significant impacts on listed wildlife species.

An SOC is merely a policy decision. In essence, the agency must decide whether it is proper to sacrifice part of the physical environment in order to reap the benefits of a project. It is CARE's position that as a CEQA lead agency in regard to siting and certification of the powerplant (as clearly distinguished from a general plan amendment, rezoning and annexation), the CEC (as a state agency completely immune from local political control or pressure by the citizens directly impacted by an SOC determination) is

not capable of making an adequate SOC, and since CEC staff itself identified feasible alternative sites that completely avoid impacts on sensitive wildlife species, the CEC has no choice but to refuse approval of the MEC project as presently designed on its present site. This is in accordance with section 21002 of CEQA.

In regard to its own project, the city may be in a position to make a valid SOC. However, what's the use of the city wasting its time and resources considering the Calpine/Bechtel application if the powerplant as presently designed and sited cannot be approved by the CEC?

We respectfully demand that the city as well as the CEC address these vital CEQA issues immediately. In addition, during the 08/16/00 CEC status hearing, Ms. Prevetti also stated, in reference to the city's proposed CEQA process: "Our city attorney's office has been in communication with the CEC Staff Counsel office..." Pursuant to the California Public Records Act (Government Code section 6250 et seq.), and particularly sections 6256 and 6257 of the Government Code, we hereby request that we be allowed to inspect and make copies of all writings containing information in any manner relating to or involving communications between the city and the CEC concerning the CEQA review process to be carried out by the city. By copy of this letter, we are also making the same demand to the CEC.



Michael E. Boyd President, CARE 9-1-00

cc.

[mayoremail@ci.sj.ca.us](mailto:mayoremail@ci.sj.ca.us);  
[linda.lezotte@ci.sj.ca.us](mailto:linda.lezotte@ci.sj.ca.us);  
[charlotte.powers@ci.sj.ca.us](mailto:charlotte.powers@ci.sj.ca.us);  
[cindy.chavez@ci.sj.ca.us](mailto:cindy.chavez@ci.sj.ca.us);  
[margie.matthews@ci.sj.ca.us](mailto:margie.matthews@ci.sj.ca.us);  
[manny.diaz@ci.sj.ca.us](mailto:manny.diaz@ci.sj.ca.us);  
[frank.fiscalini@ci.sj.ca.us](mailto:frank.fiscalini@ci.sj.ca.us);  
[district7@ci.sj.ca.us](mailto:district7@ci.sj.ca.us);  
[alice.woody@ci.sj.ca.us](mailto:alice.woody@ci.sj.ca.us);  
[john.a.diquisto@ci.sj.ca.us](mailto:john.a.diquisto@ci.sj.ca.us);  
[pat.dando@ci.sj.ca.us](mailto:pat.dando@ci.sj.ca.us)  
[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

MEC Proof of Service List